

**RULEMAKING HEARING RULES
OF
THE TENNESSEE ETHICS COMMISSION**

**CHAPTER 0580-1-3
RULES PERTAINING TO ADMINISTRATIVE SANCTIONS AND
COMPLAINT PROCEEDINGS OF THE TENNESSEE ETHICS COMMISSION**

The term "administrative sanctions" was not deleted because these rules do not relate solely to complaints; sections .06 and .07 include administrative sanctions that may be unrelated to a complaint, such as a civil penalty for late payment of a registration fee.

NEW RULES

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0580-1-2-.01 PURPOSE AND SCOPE.

These rules are promulgated for the purpose of providing procedures for the processing, investigation and adjudication of complaints, for the assessment of administrative sanctions, and for the conduct of hearings under the jurisdiction of the Tennessee Ethics Commission pursuant to the provisions of Title 3, Chapter 6 of the Tennessee Code Annotated.

Authority: T.C.A. §§ 3-6-105, 3-6-107, 3-6-301, 3-6-308(a)(10).

0580-1-2-.02 DEFINITIONS.

- (1) Commission. The Tennessee Ethics Commission.
- (2) Executive Director. The Executive Director of the Tennessee Ethics Commission.

Authority: T.C.A. § 3-6-107(1).

0580-1-3-.03 RECEIPT AND INVESTIGATION OF COMPLAINTS.

- (1) Complaints shall be received by the Commission or initiated upon the Commission's own vote in accordance with the provisions of T.C.A. § 3-6-201.
- (2) Complaint proceedings and records relating to a preliminary investigation shall be kept confidential by Commission staff and Commission members in accordance with the requirements contained in T.C.A. § 3-6-202.
- (3) Upon receipt of a complaint, the Commission's General Counsel or designee shall determine, in accordance with the provisions of T.C.A. § 3-6-203, whether the complaint meets the threshold statutory requirements to be treated as a cognizable complaint, including whether it alleges violations of laws which are within the jurisdiction of the Commission to enforce; provided, however, complaints against a candidate in any election shall be processed in accordance with the procedures set forth in T.C.A. § 3-6-201(e).

Instead of adding a reference to § 201(e) to paragraph (a) below I instead moved the reference that was in paragraph (c) to the main paragraph (3) above in order to better clarify that its provisions apply to the

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entire section.

- (a) If the complaint alleges violations of the laws that are within the jurisdiction of the Registry of Election Finance, the Commission's General Counsel or designee shall refer the complaint to the Registry of Election Finance and provide notice of such referral to the alleged violator and to the complainant in accordance with the requirements of T.C.A. §§ 3-6-201(f) and 3-6-203(a).
- (b) If the Commission's General Counsel or designee determines that the complaint is not covered by subsection (a) above and either does not meet the threshold statutory requirements to be treated as a cognizable complaint, or does not allege violations of laws that are within the jurisdiction of the Commission, the Executive Director shall dismiss the complaint and provide notice thereof to the alleged violator and to the complainant, in accordance with the requirements of T.C.A. §§ 3-6-201(f) and 3-6-203(a).

I did not add the notice requirements to the end of this paragraph because, since the requirements are detailed in § 203(a), I felt that the language was superfluous.

- (c) If the Commission's General Counsel or designee determines that the complaint meets the threshold statutory requirements to be treated as a cognizable complaint and to allege violations of laws that are within the Commission's jurisdiction, the Executive Director shall provide notice thereof to the alleged violator and to the complainant, in accordance with the requirements of T.C.A. §§ 3-6-201(f) and shall refer the complaint to the Office of the Attorney General and Reporter for investigation, in accordance with the requirements of T.C.A. § 3-6-203(b).

THE CONCEPT THAT WHEN A COMPLAINT IS SUMMARILY DISMISSED, THE COMMISSION MUST EXPLAIN WITH SPECIFICITY IMPLIES THAT THE COMPLAINANT MAY DISPUTE THE VALIDITY OF THE SUMMARY DISMISSAL. WHAT IS THE PROPER PROCEDURE FOR DEALING WITH A SUMMARY DISMISSAL THAT IS DISPUTED?

The Commissioners may determine what procedures, if any, they wish to follow in this regard. Since the statute doesn't explicitly provide a right to request a "reconsideration" of the dismissal, I would not add a right to the rules, as we have already received complaints from individuals who are clearly unbalanced, and they could use such right to waste the Commission's time and harass the accused. If the Commission wishes to add such a provision one option might be to allow the complainant to write to the Commissioners, providing the basis upon which they believe that the decision was erroneous. The Commission could then consider the claim at their next regularly scheduled meeting, but give the complainant no right to present evidence (e.g., no right to have a hearing), and no right to appeal the decision.

Authority: T.C.A. §§ 3-6-201 through 3-6-203.

0580-1-3-.04 PROBABLE CAUSE HEARINGS.

- (1) Upon receipt of the report of the Office of the Attorney General and Reporter, the Executive Director shall schedule a probable cause hearing in consultation with the Commission for a date after the complainant and alleged violator received notice of the informal probable cause hearing pursuant to paragraph (2) below.
 - (a) The complainant or alleged violator may petition the Commission for a continuance of the probable cause hearing, which the Commission may, in its discretion, grant for good cause shown.

I did not change the language to "adequate time to prepare", as I believe that it would allow the complainant or alleged violator the right to unreasonably or indefinitely delay the proceedings. Instead, I have added the provision for "consultation with the Commission", and have additionally added a provision allowing for a petition for a continuance.

- (b) The probable cause hearing shall not be a meeting under the provisions of the Tennessee Open Meetings Act, but shall be closed to the public as provided in T.C.A. § 3-6-202, unless the alleged violator requests in writing that the investigation and associated records and meetings be made public as provided in T.C.A. § 3-6-202(a)(1)(A).

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- (c) The probable cause hearing referenced in this section shall not be required to be held pursuant to the contested case provisions of T.C.A. § 4-5-301, *et seq.*
- (2) Upon scheduling the probable cause hearing, the Executive Director or designee shall provide to both the complainant and the alleged violator, via certified mail, return receipt requested and by first class mail, or by personal service, notice that includes the following:
 - (a) A copy of the report of the Office of the Attorney General and Reporter;
 - (b) The date, time and location of the probable cause hearing; and
 - (b) The opportunity to choose one (1) of the following options:
 - 1. To present evidence before the Commission prior to the Commission's probable cause determination; or
 - 2. To waive the right to present evidence before the Commission so that the Commission's consideration is limited to the documents filed with the Complaint and the report of the Attorney General and Reporter.

I don't recommend placing a requirement on complainants and alleged violators that they explicitly waive the opportunity to present evidence. If the complainant/violator is given notice of a right to appear personally or in writing and notice of the requirement to notify the Commission of such - and they either intentionally or negligently fail to provide such notice - they have automatically waived their right by operation of the rules. In addition, specific waiver language could potentially conflict with the rules regarding notice; e.g., they could claim that negligent failure to give notice does not act as a waiver due to the specific waiver language, and thus they must be given another opportunity. Finally, please note that paragraphs (2) through (4) were taken directly from the procedures set forth in the "employer of lobbyist failure to register civil assessment letter", which was previously voted on and approved by the Commission.

- (3) A complainant or alleged violator wishing to present evidence before the Commission prior to the Commission's probable cause determination shall notify the Commission office in writing at least thirty (30) days before the scheduled hearing. The party shall specify whether the party wishes to:
 - 1. Appear personally or through an attorney or other authorized representative to present an oral statement and any written documents relevant to the probable cause determination; or
 - 2. Appear by sworn, notarized statement, including any pertinent exhibits.

FYI - the UPAPA and the Secretary of State rules provide exact formatting rules which must be followed, including margins, font, and numbering. All paragraphs must be numbered, and thus I have added such numbering.

- (4) If the complainant or alleged violator will appear through an attorney or other authorized representative, such notice to the Commission must include the name and contact information of the attorney or other authorized representative. The written documents that the party intends to submit must be filed with the Commission office, marked as the party's exhibits. *The next paragraph already provides for submission of written documentation - are you placing a special requirement on individuals who appear through an authorized representative? Also, many of these people will not be attorneys - I don't think that they should be required to mark their documents as "exhibits".*

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- (5) A complainant or alleged violator wishing to appear by sworn notarized statement must submit the statement and any accompanying documentation to the Commission office along with the notice to the Commission. *I don't understand what you mean by this addition – do you mean that the party is to provide notice to both the staff and the Commission members?*

The other party shall file any written documents that it wishes the Commission to consider, marked as the party's exhibits, within 20 days before the probable cause hearing. *I don't understand what you mean by "other party" – are you referring to either the complainant or the alleged violator filing responsive pleadings?*

- (6) At the probable cause hearing, if a party has chosen to appear personally or through an attorney or other authorized representative, individual Commission members or the Commission's General Counsel may, as deemed appropriate by the Commissioner who is presiding over the hearing, question the individual presenting oral or written evidence.
- (7) The Commission may limit the presentation of the oral statement, or the submission of written documents, if the Commission determines such evidence to be duplicative of evidence already submitted, or irrelevant to the factual or legal questions pending before the Commission, or that for some other reason it is not admissible. *I do not recommend adding this phrase, as "admissibility" is a legal standard, and I believe that the paragraph as originally written adequately provides for the Commission's discretionary authority regarding the presentation of evidence.*
- (4) If the Commission determines that no probable cause exists to believe that a violation of any law or rule administered and enforced by the Commission has occurred, the Commission shall dismiss the complaint by issuing a written report to the complainant and alleged violator, stating with particularity the Commission's reasons for dismissal of the complaint. The Commission staff shall send such notice to the complainant and the alleged violator by certified mail, return receipt requested, and by first class mail.

I'm not sure what happened in this section – the complainant's rehearing was originally set apart, and somehow in the editing process it became mixed in. At any rate, as you can see I "accepted" your changes in this regard, as they are in line with how the draft was originally intended to be! <grin>

- (a) The Commission's report finding no probable cause shall additionally inform the complainant of the opportunity to request a rehearing by submitting such request in writing to the Commission office no later than ten (10) business days after the date on which the Commission's report is postmarked. Such request shall state with specificity the reasons why the complainant contends that the Commission's finding of probable cause was erroneous.
- (b) Upon receipt of a written request from the complainant, the Executive Director shall schedule a probable cause hearing as provided above, at which the Commission shall consider the complainant's reasons for contending that the original finding of no probable cause was erroneous, along with any response from the alleged violator contending that the finding of no probable cause was correct. *I don't recommend adding this last section. The hearings are informal and entirely within the Commission's discretion, and there may be many factors that the Commission finds it appropriate to consider, while there may be other factors that the Commission finds it appropriate to ignore (as merely duplicative, for example).*
- (c) If, after the second probable cause hearing, the Commission determines that there is no probable cause and that its original finding was correct, the Commission may order the complainant to reimburse the alleged violator for any reasonable costs and reasonable attorney fees that the alleged violator has incurred in connection with such request for rehearing.

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- (5) Upon a determination of no probable cause, if the alleged violator has not previously requested that the matter be made public, the Commission shall make public the records and proceedings in the matter sixty (60) days after the later of: (1) the date the report of the Commission's finding is issued if the complainant does not request a rehearing, or (2) the date the Commission issues its finding of no probable cause from a probable cause hearing.

Authority: T.C.A. §§ 3-6-201 through 3-6-203.

0580-1-3-.05 PUBLIC COMPLAINT HEARINGS

- (1) If the Commission determines that probable cause exists to believe that a violation of a law or rule administered and enforced by the Commission has occurred, the Executive Director shall schedule a public contested case hearing in consultation with the Commission and the parties. *I do not recommend that this phrase be added – typically it is the Administrative Law Judge who controls scheduling.*
- (2) The Executive Director or designee shall provide notice of the hearing to the complainant and alleged violator as required by T.C.A. § 4-5-307. If the alleged violator is a member of the general assembly, the Executive Director shall additionally provide this notice to the ethics committee of the appropriate house pursuant to T.C.A. § 3-6-203(b)(2).
- (3) The Executive Director shall publish public notice of such hearing in the same manner as public notices of regularly scheduled Commission hearings are posted.
- (4) The contested case hearing shall be conducted by an Administrative Law Judge assigned by the office of the Secretary of State in the presence of a minimum of four (4) Commission members, pursuant to the provisions of the Administrative Procedures Act in Title 4, Chapter 5, Part 3, of the Tennessee Code Annotated. The Commission staff shall provide for a record of the proceedings to be maintained as required by T.C.A. § 4-5-319.
- (4) Any party may be represented by counsel of the party's choice. The Commission shall be represented by its General Counsel or designee.
- (5) Hearing testimony may be taken by telephone in a manner that allows all parties present to hear the testimony, if approved by the Administrative Law Judge for good cause shown. *I deleted the phrase "in advance", as I have had many cases when such decision was made minutes before the hearing (due to severe weather, for example) – the ALJ makes such determinations.*
- (6) The Commission may, on its own motion or at the request of the alleged violator, issue subpoenas and assess fees related thereto in accordance with the provisions of T.C.A. §§ 3-6-204(a) and 3-6-107(2). Such subpoenas shall be issued through the Executive Director in the form and manner in which subpoenas are issued by clerks of court under the Tennessee Rules of Civil Procedure.
- (7) Findings of the Commission regarding whether or not the alleged violation occurred shall be based upon a majority vote of the Commission members present, and shall be based upon a preponderance of the evidence.
- (8) The Commission's ruling shall be in the form of an order of the Commission, which shall include: *The foregoing must be included within the order, not "in addition to", and thus I've rephrased.*
- (a) Findings of fact and conclusions of law for all aspects of the order and reference to, as appropriate, any exhibits entered in the case; and *The original language was provided by an ALJ and is intended to establish that each conclusion of an order must have an accompanying finding, and additionally to require that marked exhibits must be specifically referenced. Thus, I have changed the language back to the original.*

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- (b) A statement of the available procedures and the time limits for seeking reconsideration or other administrative relief, as well as the time limits for seeking judicial review of the final order pursuant to T.C.A. § 3-6-204(b). An initial order or decision shall include a statement of any circumstances under which the initial order or decision may, without further notice, become a final order.
- (9) If the Commission finds that the alleged violator violated any law or rule administered and enforced by the Commission, the Commission shall issue an initial order which includes the information required by paragraph (8) above, but which reserves a decision on the imposition of any sanctions until the Commission's next regularly scheduled meeting. This initial order shall additionally inform the violator of:
 - (a) The date, time and location of the next regularly scheduled Commission meeting in which Commissioners will vote on what, if any, sanctions to impose;
 - (b) The violator's right to submit to the Commission, within fifteen (15) business days after entry of the initial order, any written documentation the violator wishes the Commission to consider when determining what, if any, administrative sanctions to impose on the violator.

WHAT IS THE SOURCE OF THIS AUTHORITY? *Are you referring to the imposition of sanctions? While it is not explicitly set forth in the statute, as long as there is adequate notice, opportunity, and findings I believe that the Commission can choose what procedures it wishes to follow for the imposition of those sanctions which are discretionary under the statute. The bifurcated system set forth above is one proposed method, which in my personal experience works well because, in many cases, the issues relating to what sanctions, if any, to impose can be quite different from the issues relating to the determination of guilt (for example, whether or not to actually revoke a lobbyist's registration).*

- (10) The Commission or Administrative Law Judge shall designate the party responsible for preparing an order. Commission orders shall be signed by the Chair of the Commission, or by his/her designee who attended the contested hearing in the absence or inability of the Chair to act. The Commission's General Counsel or designee shall file the order with the Administrative Procedures Division in the Office of the Secretary of State within five (5) business days following signature by the appropriate Commissioner. The Commission staff shall provide copies of the signed order to all parties.

Authority: T.C.A. §§ 4-5-301 et seq.; T.C.A. §§ 3-6-107(2); 3-6-107(6); 3-6-203 through 3-6-204.

0580-1-3-.06 INFORMAL SHOW CAUSE HEARINGS.

- (1) When the Commission is considering issuing civil penalties or other administrative sanction as provided for in T.C.A. §§ 3-6-107(8) and 3-6-306(b) as a result of a finding in a complaint proceeding, the notice and hearing procedures set forth in the previous section .05 shall be followed instead of the following procedures contained in this section 0580-1-3-.06.
- (2) When the Commission's General Counsel or designee determine that an individual or entity within the jurisdiction of the Commission has violated a law or rule administered and enforced by the Commission, the Executive Director shall provide notice via certified, return receipt requested and first class mail that informs the alleged violator of the:
 - (a) Specific allegations, including citation to the specific law or rules violated;

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- (b) Maximum administrative sanctions possible, including citation to the specific law or rules authorizing the sanction;
- (c) Date, time and location of the next regularly scheduled meeting in which the Commission will consider the imposition of such administrative sanctions; and
- (d) Opportunity to choose one (1) of the following options:
 - 1. Appear personally or through an attorney or other authorized representative to show cause why administrative sanctions should not be imposed, or why the maximum administrative sanctions available should not be imposed; or
 - 2. Appear by sworn, notarized statement, including any pertinent attachments, to show cause why administrative sanctions should not be imposed, or why the maximum administrative sanctions available should not be imposed.
- (3) An individual wishing to personally appear at the informal show cause hearing must submit to the Commission office written notice of such appearance no later than ten (10) days prior to the scheduled hearing. If the individual will appear through an attorney or other authorized representative, such notice to the Commission must additionally include the name and contact information of the attorney or other authorized representative.
- (4) An individual wishing to appear by sworn notarized statement must submit the statement and any accompanying documentation to the Commission office no later than ten (10) days prior to the scheduled informal show cause hearing.
- (5) Individual Commission members or the Commission's General Counsel may, as deemed appropriate by the Commission Chair or Vice-Chair, question the individual presenting oral or written evidence.
- (6) The Commission may limit the presentation of the oral statement or the submission of written documents if the Commission determines such evidence to be duplicative of evidence already submitted or irrelevant to the factual or legal questions pending before the Commission.
- (7) The informal show cause hearing referenced in this section shall not be required to be held pursuant to the contested case provisions of T.C.A. § 4-5-301 *et seq.*

Authority: T.C.A. §§ 4-5-301 *et seq.*; T.C.A. §§ 3-6-205; 3-6-306.

0580-1-3-.07 ISSUANCE, RECONSIDERATION AND APPEAL OF ORDERS ASSESSING ADMINISTRATIVE SANCTIONS

- (1) Upon a majority affirmative vote by the Commission members present, an order assessing civil penalties or an order assessing the administrative sanction provided for in T.C.A. § 3-6-306(b) shall be issued. The Chair of the Commission or the Executive Director shall have the authority to issue the order on behalf of the Commission, and Commission staff shall serve the order by mailing it certified mail return receipt requested or first class mail.

I DO NOT UNDERSTAND THIS RULE. *Are you referring to paragraph (1) or paragraph (2)? Do you mean requests for reconsideration?*

- (2) The order shall include notice to the individual or authorized representative named in the order that:
 - (a) A request for reconsideration of the order may be submitted in writing to the Commission

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within fourteen (14) days from the date of the issuance of the order.

- (i) Such written request must include additional information concerning the matter that was not available for the Commission's consideration at the meeting in which the order was issued.
 - (ii) Written requests for reconsideration which fail to include the additional information referenced in paragraph (i) above will be dismissed without further consideration by the Commission.
 - (b) The order may be appealed within thirty (30) days from the date of the issuance of the order pursuant to the procedures provided for under the Uniform Administrative Procedures Act, T.C.A. §4-5-301, *et seq.*;
 - (c) If the order assesses civil penalties, such penalties must be paid in full to the Commission within thirty (30) days from the date of the issuance of the order unless a request for reconsideration or appeal is submitted pursuant to subparagraphs (a) and (b) above.
- (3) If an order mailed by certified mail is returned from the United States Postal Service as unclaimed, the order shall be reissued and mailed by Commission staff via overnight mail delivery. The individual or authorized representative to whom the order is issued shall have thirty (30) days from the date of the reissuance of the order to request reconsideration, appeal, or pay assessed fines in accordance with subparagraphs (a) through (c) above.
 - (4) Requests for Reconsideration. While a request for reconsideration of an order is pending, the order shall not become final. Upon an affirmative Commission vote denying a request for reconsideration, an order shall be issued which denies the request and allows the individual or authorized representative named in the order ten (10) days after the date of the issuance of the order to appeal the original assessment order under the Tennessee Administrative Procedures Act. If not appealed the order becomes a final order.
 - (5) Appeals. Orders shall be appealed by filing a petition with the Commission, which shall be considered a request for a contested case hearing pursuant to the Uniform Administrative Procedures Act, T.C.A. §4-5-301, *et seq.*
 - (6) If the Commission's order is not appealed within thirty (30) days of its issuance, the order becomes a final order.
 - (7) If an order assessing monetary sanctions becomes final without the individual or entity named in the order taking action to request reconsideration, appeal or to pay in full the amount assessed, upon the order becoming final Commission staff shall forward the matter to the Office of the Attorney General & Reporter for collection and other appropriate legal action pursuant to T.C.A. § 3-6-206 and other applicable law.

Authority: T.C.A. §§ 2-10-207(1), 3-6-103(a)(9), 3-6-110, and 3-6-206.